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**IN THE  
COURT OF APPEALS OF INDIANA**

CLAUDE COPELAND,

Appellant,

VS.

JIM A. BORROR, MULTIFOODS  
TRANSPORTATION, INC., UNKNOWN  
PERSON, STATE OF INDIANA, and  
INDIANA DEPT. OF TRANSPORTATION.

Appellees.

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No. 89A05-0505-CV-286

APPEAL FROM THE WAYNE SUPERIOR COURT

The Honorable Gregory A. Horn, Judge

Cause No. 89D02-0306-PL-17

**August 31, 2006**

## **MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

### **Case Summary**

Claude Copeland appeals the trial court's grant of summary judgment in favor of the State of Indiana and the Indiana Department of Transportation ("INDOT"). We affirm.

### **Issue**

The sole restated issue is whether the trial court erred in granting the State and INDOT's motion for summary judgment.

### **Facts**

On September 7, 2001, Milestone, a contractor with the INDOT, was in the process of completing the resurfacing of the eastbound lanes of I-70, between State Road 1 and Centerville Road. At approximately 1:00 a.m., INDOT's Centerville office received a call regarding a single-vehicle accident in Wayne County. Jerry Hicks and John Hall, employees of the Cambridge City Unit of INDOT, were called to respond to the scene of the accident and were instructed to shut down the eastbound lanes at State Road 1 using arrow board signs.

At approximately 7:45 a.m., Claude Copeland was driving a tractor-trailer for his employer, Arnold Transportation Services, Inc., on I-70, east of State Road 1. While traveling eastbound, Copeland noticed a flashing arrow on the right hand shoulder of the road pointing to the left lane. Believing that the arrow indicated the right-hand lane was

closed ahead, Copeland moved his truck into the left lane. Continuing to travel down I-70, Copeland then saw a yellow construction vehicle ahead of him traveling with an arrow pointing to the right and, “with no warning, the construction vehicle with the arrow board came to a sudden stop causing cars behind it and myself to attempt to stop.” App. p. 167. “Due to rush hour traffic[,] there was no escape to the right-hand lane, I could not change lanes because I had to come to a complete stop.” Id. After coming to a complete stop, Copeland’s truck was struck from behind by another tractor-trailer.

Copeland stated that he then exited his truck and spoke with the driver of the yellow construction vehicle, who turned out to be Hall. Questioning the driver about his sudden stop in rush hour traffic, Copeland stated that the driver, pointing at the arrow on the back of his truck, said, “there’s your warning.” Id. at 167. Copeland then checked on the driver of the tractor-trailer that struck him and, while returning to his truck, Copeland saw the driver of the yellow construction vehicle drive away. Unable to obtain the driver’s name, Copeland took a picture of the vehicle that had a “Work Crew Ahead” sign on it. Id. at 169.

On December 6, 2002, Copeland’s attorney sent a letter to INDOT requesting records pertaining to any work being performed on I-70 on September 7, 2001. Believing that the yellow vehicle was associated with the construction occurring on the interstate, Copeland filed suit against Milestone in June of 2003. In March of 2004, Milestone informed Copeland that the vehicle in question was not owned or operated by any of its employees. Copeland then amended his complaint to add the State and INDOT as defendants (collectively “State”). In July of 2004, the State filed a motion to dismiss

alleging that Copeland failed to file a timely notice in compliance with the Indiana Tort Claims Act (“ITCA”). On September 9, 2004, Milestone moved for summary judgment, and on December 6, 2004, the motion was granted. That same day, the trial court decided to treat the State’s motion to dismiss as a motion for summary judgment, allowing the parties to file further designations of materials, affidavits, and briefs in opposition. On April 4, 2005, the State’s motion for summary judgment was granted. Copeland now appeals the granting of the State’s motion for summary judgment.

### **Analysis**

Copeland contends the trial court erred in granting summary judgment in favor of the State. Summary judgment is appropriate only if the pleadings and evidence designated to the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); see also Troxel Equipment Co. v. Limberlost Bancshares, 833 N.E.2d 36, 39-40 (Ind. Ct. App. 2005), trans. denied. On review of a trial court’s grant of summary judgment, this court applies the same standard as the trial court to ensure that the parties were not improperly denied their day in court. Simon Property Group, L.P. v. Acton Enterprises, Inc., 827 N.E.2d 1235, 1238 (Ind. Ct. App. 2005), trans. denied. Neither the trial court nor the reviewing court may look beyond the evidence specifically designated to the trial court. Id. The court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. Id.

Copeland argues the State is estopped from asserting the notice requirement of ITCA as a bar to his claim. The Indiana General Assembly enacted ITCA in order to establish procedures for cases involving prosecution of tort claims against governmental entities. Garnelis v. Indiana State Dep't of Health, 806 N.E.2d 365, 368 (Ind. Ct. App. 2004). ITCA provides that a claim against the State is “barred unless notice is filed with the attorney general or the state agency involved within two hundred seventy (270) days after the loss occurs.” Id.; see also Ind. Code § 34-13-3-6(a). The notice must include the names of the persons involved, the extent of the loss, the time and place of the loss, the circumstances that brought about the loss, the amount of damages sought, and the address of the person making the claim. Daugherty v. Dearborn County, 827 N.E.2d 34, 36-37 (Ind. Ct. App. 2005), trans. denied.

The purpose of the notice requirement of ITCA is to inform State officials with reasonable certainty of the accident or incident and surrounding circumstances and to advise of the injured party's intent to assert a tort claim so that the State may investigate, determine its possible liability, and prepare a defense to the claim. Garnelis, 806 N.E.2d at 368. Because the notice provisions of ITCA are in derogation of the common law, they must be construed against limitations on a claimant's access to the courts. Id. A liberal application of ITCA is proper in order to avoid denying plaintiffs an opportunity to bring a claim where the purpose of the statute has been satisfied. Daugherty, 827 N.E.2d at 36. Thus, not all technical violations of this statute are fatal to a claim. Id. Non-compliance has been excused in certain cases based on the theories of substantial compliance, waiver, and estoppel. Id.

In passing on the proper construction to be given to this statute, we have held:

In so far as concerns the requirement that the notice be given, and within the time specified, and to the proper officers, the statute is strictly construed . . . But on the question of whether or not a notice in fact given is sufficiently definite as to the time, place, nature, etc., of the injury, the rule of liberal construction is generally adopted by the courts.

Id. Therefore, the requirement that the notice be given to the proper official within the two hundred seventy day period is strictly construed. Id. The cause of action, however, does not accrue until a plaintiff “knew or in the exercise of ordinary diligence could have discovered that an injury had been sustained” as a result of State action. Garnelis, 806 N.E.2d at 369.

Here, Copeland argues the State is estopped from asserting the notice requirement of ITCA because he reasonably lacked knowledge of Hall’s status as a government employee.<sup>1</sup> Copeland alleges Hall took affirmative, concealing steps when he left the scene of the accident and failed to reveal his government employee status. However, the accident occurred within a road construction zone. Hall’s truck was conspicuously marked as being related to the construction. In the exercise of ordinary diligence, Copeland should have contemplated that a State employee might have been the cause of the accident. This case is also distinguishable from Gregor v. Szarmach, 706 N.E.2d 240 (Ind. Ct. App. 1999), which Copeland relies on. In Gregor, the State employee was not

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<sup>1</sup> Copeland does not assert that non-compliance has been excused based on the theories of substantial compliance or waiver.

driving a marked vehicle and had a direct collision with the plaintiff. Neither was the case here.

In addition, the letter Copeland's attorney sent to INDOT on December 6, 2002, requesting the records pertaining to any work being performed on I-70 on September 7, 2001, is indicative of Copeland's recognition of the State's possible involvement. ITCA requires that notice be given to the proper official within two hundred and seventy days. In this case, the accident occurred in September of 2001. Copeland did not take steps to discover the source of his injury until December 2002, well beyond the two hundred seventy day statutory period. Any action not taken within two hundred and seventy days after Copeland's loss does not comply with ITCA.

Copeland also asserts his non-compliance with ITCA is excused by Indiana Code Section 34-11-5-1. That statute provides: "If a person liable to an action conceals the fact from the knowledge of the person entitled to bring the action, the action may be brought at any time within the period of limitation after the discovery of the cause of action." We stated that this statute "operates as an equitable device to estop a defendant from asserting a statute of limitations when he has, either by deception or by violation of duty, concealed from the plaintiff material facts preventing the plaintiff from pursuing a potential cause of action." Ayers v. State Farm Mut. Auto. Ins. Co., 558 N.E.2d 831, 833 (Ind. Ct. App. 1990), trans. denied. In Ayers we held the statute applied because the defendant fled the scene of the collision. Ayers is distinguishable in that the unknown driver directly collided with the plaintiff and fled the scene. In this case, the collision occurred behind Copeland, and there is no designated evidence to suggest that Hall knew

of the collision. Thus, Hall did not take steps to conceal his identity or knowingly violate a duty in leaving the scene. We conclude that Copeland did not effectively place the State on notice and such failure is not excused. The trial court did not err in granting the State's motion for summary judgment.

### **Conclusion**

Because Copeland failed to comply with ITCA's two hundred seventy day notice requirement, we conclude the trial court did not err in granting the State's motion for summary judgment. We affirm.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.